

**Custom Manufacturing Company (Successor to Zion Industries, Inc.—Curtain and Drapery Division); Bobbe Drapery Products Co., Inc.; Concepts in Drapery Design, Inc.; and Their Agents Frank Florence and Roberta Florence; and Interior Concepts, Inc., and Its Agents Terry Sterling, Frank Florence, and Roberta Florence and The International Chemical Workers Union, Local 665.** Cases 13-CA-13630, 13-CA-13796, and 13-CA-13998

December 10, 1981

## SECOND SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

On April 2, 1981, Administrative Law Judge Nancy M. Sherman issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief. Respondent Interior Concepts, Inc., filed limited cross-exceptions and an answering brief to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The extensive prior litigation in this proceeding is described in considerable detail in section I of the Administrative Law Judge's Decision. It suffices for our purposes here that the Board found that the named Respondents in the earlier proceedings violated Section 8(a)(1), (3), and (5) by various conduct and that the Board ordered those Respondents to make whole the Union and the employee discriminatees in accordance with the Board's Order. Both the Board's Decision and Order<sup>1</sup> and its Supplemental Decision and Order<sup>2</sup> were enforced by the United States Court of Appeals for the Seventh Circuit.<sup>3</sup>

The sole issue before the Board now involves whether Respondent Interior is an *alter ego* of the named Respondents in the earlier proceedings and thus liable on the judgments in such proceedings.

The Administrative Law Judge has provided a comprehensive review of the record evidence including, *inter alia*, the ownership, management,

business purpose, organization, and operation of the companies involved in this proceeding. Only limited exceptions have been filed to the Administrative Law Judge's factual findings.<sup>4</sup> It would serve no purpose to repeat or, in view of the extensive and detailed nature of such evidence, to attempt to summarize this evidence at the outset of this Decision and Order. The gravamen of this case is whether such evidence shows that Interior is an alter ego of Custom, Bobbe, and Concepts. Respondents urged and the Administrative Law Judge found the evidence fails to establish such alter ego status. The General Counsel excepts to the Administrative Law Judge's findings and contends that the credited record evidence supports a legal conclusion that Interior is an alter ego of Custom, Bobbe, and Concepts. We agree with the General Counsel.

The Administrative Law Judge found that the record evidence satisfied various indicia of *alter ego* status. Significantly, the Administrative Law Judge found both substantially identical ownership and substantially identical management in the four corporations. Thus, she found that, at the time Interior began operations in January 1976, 75 percent of its stock was owned by Roberta Florence, who owned all of the stock of Bobbe and Concepts and whose husband owned half of Custom's stock. With respect to the management of the four corporations, the Administrative Law Judge found that Frank Florence was an officer of all four companies, and that he managed the first three corporations on a day-to-day basis, performed selling functions for all four corporations, incorporated Interior, and by the end of 1979 was receiving the same salary from Interior as Interior's president, Terry Sterling. Similarly, Sterling, who served as salaried controller and office manager for Custom, Bobbe, and Concepts, continues to perform or supervise at least some of the functions he performed for the earlier three companies in his position as Interior's president.

Other indicia of Interior's *alter ego* status found by the Administrative Law Judge included evidence that Sterling and Frank Florence solicited and obtained business for Interior while they were still on the payroll of Concepts and before Interior formally began operations. Furthermore, one of Interior's first customers was Benjamin Brothers, which had been a customer of Custom and a major

<sup>1</sup> 220 NLRB 1256 (1975).

<sup>2</sup> 230 NLRB 691 (1977).

<sup>3</sup> Unpublished decision 96 LRRM 2394 (1976), and judgment of April 20, 1979.

<sup>4</sup> Respondent Interior has excepted to the Administrative Law Judge's finding that Sterling and Frank Florence were spending a substantial amount of time soliciting business for Interior while they were still on the payroll of Concepts in early 1975 and to her finding that there is a substantial identity of ownership and management between Interior and the other three named Respondents. The record supports these findings by the Administrative Law Judge.

customer of Bobbe and Concepts, and to which Interior provided substantially the same services (except fabrication) which Benjamin Brothers had received from the other three corporations. Also, Roberta Florence handled all of the billing functions for both Concepts in Drapery and Interior. Finally, the Administrative Law Judge found that the Florences, Sterling, and two installers, who constituted the entire final payroll of Concepts, were transferred to Interior's payroll without any break in their employment.

Despite the Administrative Law Judge's finding that the foregoing evidence satisfied various indicia of *alter ego* status, she nevertheless relied on other "countervailing considerations" to conclude that Interior was not an *alter ego* of the other three corporations. In so concluding, the Administrative Law Judge found that Interior differed from the other three corporations because Interior never employed production employees, Interior's facilities were much smaller and at a different location, and Interior's customers (except for Benjamin Brothers) and its suppliers are different. Further, the Administrative Law Judge pointed out that the principal business shifted from manufacturing drapes to be used in private residences to sales to institutions and commercial establishments of products manufactured by others. In short, the Administrative Law Judge relied on changes in business operations to find that Interior is not an *alter ego* of the other three corporations.<sup>5</sup>

In assessing the changes in business operations for the purpose of determining Interior's status as an *alter ego* of Custom, Bobbe, and Concepts, it must be taken into account that a substantial portion of these changes took place in Custom's successor *alter egos*, Bobbe and Concepts. Thus, Custom manufactured draperies from its own materials for residential customers and marketed the product through department stores. When Custom was no longer in an economic position to carry an inventory of materials, Bobbe was incorporated and continued the business by manufacturing draperies from customers' materials. A consequence of this change was a loss of residential business and a shift to institutional customers which was continued by Concepts. Another consequence of these changes in business operations from Custom to Concepts—and carried forward in Interior—was

the transformation from a manufacturer to a broker of draperies materials and goods.

When viewed against the background of the changes in business operations from Custom to Concepts, the changes from Concepts to Interior do not represent an abrupt shift but another step in the evolution of the drapery business from manufacturer to broker and from residential to institutional customers. In each instance, the principals of all four corporations applied their expertise in the drapery business to the economic conditions available to them. There was no real hiatus between Concepts and Interior, which was consistent with the pattern of discontinuing one drapery business and commencing a new scaled-down operation in the earlier three corporations.<sup>6</sup> In short, although Interior downplays the scope and effect of the foregoing record evidence showing both a connection between, and carryover from, the business operations of Concepts and Interior, the point remains that it was a spinoff of the former businesses tempered by the economic resources available to the principals at each given time. Thus, the changes in business operations revealed by this record can be characterized fairly as having:

. . . amounted essentially to evolutions, extensions and developments merely, such as could characteristically be expected to occur in the particular business field and in the economic era involved, without having so changed the nature of the enterprise and its job situations as to cause it to be outside the bounds of legitimate remedial area in respect to the discriminatees.<sup>7</sup>

In sum, we find that Interior is an *alter ego* of Custom, Bobbe, and Concepts. As such, we find that Interior is derivatively liable to provide the remedies ordered by the Board including backpay due the discriminatees.<sup>8</sup>

<sup>5</sup> Custom's operations were discontinued in August 1974, the same month that Bobbe was incorporated. Similarly, Bobbe went out of business and Concepts commenced operations, both in February 1975. As more fully discussed by the Administrative Law Judge, Concepts was winding down its business at the same time Interior was being incorporated in August 1975. We also note that, just as the change from Bobbe to Concepts in February 1975 coincided with the issuance of one of the complaints and the filing of the charges that resulted in another of the complaints here, Concepts was ceasing business and Interior was formed while these cases were before the Board.

<sup>7</sup> *N.L.R.B. v. Ozark Hardwood Company*, 282 F.2d 1, 6 (8th Cir. 1960). The only reasons offered by Interior for the changes in the corporate entity were the need for a fresh start and Continental Bank's concern that its interest might be affected by other creditors. But there is no contention, or evidence to show, that such changes could not have been handled within the framework of Concepts. The absence of such evidence, coupled with the substantial identity of ownership and management of the corporations, undermines Interior's contention that it is not an *alter ego*.

<sup>8</sup> *Custom Manufacturing Company (successor to Zion Industries, Inc.—Curtain and Drapery Division); Bobbe Drapery Products Co., Inc., and Con-*  
Continued

<sup>6</sup> The Administrative Law Judge also found that the evidence failed to establish that Interior was set up for the purpose of evading the Act and that there was no transfer of assets. Although she acknowledged that these two factors were not necessary elements to find *alter ego* status, she nevertheless weighed them along with the other changes described above in reaching her conclusion that Interior was not an *alter ego* of the other three named corporations. We find the Administrative Law Judge's reliance on these factors to be misplaced.

## CONCLUSIONS OF LAW

1. Interior Concepts, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Interior Concepts, Inc., is an *alter ego*.

3. As the *alter ego* of Custom Manufacturing Company (Successor to Zion Industries, Inc.—Curtains and Drapery Division); Bobbe Drapery Products Co., Inc.; and Concepts in Drapery Design, Inc., Interior Concepts, Inc., is derivatively liable for backpay due discriminatees as part of the Board's remedy for unfair labor practices as set forth in 220 NLRB 1256 (1975) and 230 NLRB 691 (1977).

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Interior Concepts, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, as an *alter ego* of Custom Manufacturing Company (Successor to Zion Industries, Inc.—Curtain and Drapery Division); Bobbe Drapery Products, Co., Inc.; and Concepts in Drapery Design, Inc., shall make whole the discriminatees named in the Board's Supplemental Decision and Order set forth at 230 NLRB 691, 692, in the amount and manner described therein.

*cepts in Drapery Design, Inc., Southeastern Envelope Co., Inc., and Southeastern Expandvelope, Inc. (Diversified Assembly, Inc.), 246 NLRB 423 (1979).*

## DECISION

NANCY M. SHERMAN, Administrative Law Judge: This case was heard before me in Chicago, Illinois, on November 17, 1980, pursuant to a backpay specification and notice of hearing issued on May 16, 1980. The backpay specification alleges that Interior Concepts, Inc. (Interior Concepts), is an *alter ego* of other corporations which are named in the specification and which in April 1979 were judicially directed to pay certain sums required by a Supplemental Decision and Order of the Board issued in July 1977.

Upon the entire record, including the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel and by counsel for Interior Concepts and by its agents Terry Sterling, Frank Florence, and Roberta Florence, I hereby make the following:

## FINDINGS OF FACT

## I. THE PRIOR LITIGATION

On October 2, 1974, The International Chemical Workers Union, Local 665 (the Union), filed a charge against "Custom Manufacturing Co., Successor to Zion Industries, Drapery Div." (Custom), docketed as Case

13-CA-13630, which alleged, *inter alia*, that "the above-named employer" had "discriminated against Union members and officers." On November 20, 1974, a complaint bearing this docket number was issued against Custom. The complaint contained no allegations that Custom had unlawfully terminated employees or failed to make contractually required payments, but did allege, *inter alia*, that at all material times "Frank Florence occupied the position of President of [Custom], and has been and is now an agent and supervisor of" Custom.

On November 27, 1974, the Union filed against Custom another charge, which was docketed as Case 13-CA-13796. The charge alleged, *inter alia*, that "the Employer" had "through its agents and officers unilaterally terminated the Accident & Insurance Plan, the Life Insurance Plan, and the Pension Plan." On February 6, 1975, a complaint with the docket number 13-CA-13796 was issued against Custom. The complaint alleged, *inter alia*, that at all material times Frank Florence "occupied the position of president of the Respondent, and has been and is now an agent and supervisor of Respondent, acting on its behalf." The complaint further alleged that Custom had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (the Act) by unilaterally changing existing wage rates, benefits, and conditions of employment by failing and/or ceasing to make payments and contributions into and discontinuing the pension plan described in a collective-bargaining agreement between the Union and Custom.

On February 13, 1975, the Union filed a charge, docketed as Case 13-CA-13998, against Custom and Bobbe Drapery Products (Bobbe). The charge alleged that "the above-named Employer, through its officers and agents," had unlawfully transferred and/or closed down "its" Zion, Illinois, facility. On April 22, 1975, the Union filed an amended charge in Case 13-CA-13998, against Custom, Bobbe, Concepts in Drapery Design, Inc. (Concepts in Drapery), Frank Florence, and Roberta Florence. The amended charge alleged, *inter alia*, that "the above-named Employer, through its officers and agents," had unlawfully transferred and/or closed down "its" Zion, Illinois, facility. That same day, the Union filed an amended charge in Case 13-CA-13796 against Custom, Bobbe, Concepts in Drapery, Frank Florence, and Roberta Florence, alleging, *inter alia*, that "the Employer has through its agents and officers unilaterally terminated the Accident & Insurance Plan, and Life Insurance Plan, and the Pension Plan." On April 24, 1975, the Union filed a first amended charge in Case 13-CA-13630 against Custom, Bobbe, Concepts in Drapery, Frank Florence, and Roberta Florence. The charge alleged, *inter alia*, that "the above-named Employer" had "discriminated against union members and officers."

On April 30, 1975, a complaint was issued with the docket number 13-CA-13998. The caption named Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence." The body of the complaint stated that Custom, Bobbe, Concepts in Drapery, Frank Florence, and Roberta Florence would be referred to as "Respondents, collectively." The complaint alleged, *inter alia*, that the initial charge had been served

on "Respondent Custom" and "Respondent Bobbe"; that the first amended charge had been served on "Respondents"; that Bobbe was the *alter ego* to Custom; that Concepts in Drapery was an *alter ego* to Custom and Bobbe; and that Custom, Bobbe, and Concepts in Design were "employers" within the meaning of the Act. The complaint further alleged that at all material times Frank Florence was president of Custom and was an agent and supervisor of Custom, Bobbe, and Concepts in Drapery; and that Roberta Florence was at all material times president and an agent of Bobbe and Concepts in Drapery. Also, the complaint alleged that "Respondents" had violated the Act by unilaterally terminating a collective-bargaining agreement between Custom and the Union, and by terminating "all its [sic] employees employed at its Zion, Illinois, facility, and thereafter [failing] and [refusing] to offer employment to those employees at its Chicago, Illinois, facility."<sup>1</sup>

Also on April 30, 1975, the Regional Director issued a pleading whose caption named Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence." The docket numbers on the pleading were 13-CA-13640 and 13-CA-13796, and it was entitled "Amended Consolidated Complaints and Notice of Hearing." The body of the complaint stated that the corporations named in the caption "[A]nd Their Agents Frank Florence and Roberta Florence" were "herein called Respondent Custom, Respondent Bobbe, Respondent Concepts, Respondent Frank Florence, and Respondent Roberta Florence, respectively, and Respondents collectively." The complaint alleged, *inter alia*, that the first amended charges in both cases had been served "on Respondent Custom; Respondent Bobbe; Respondent Concepts [in Drapery]; Respondent Frank Florence and Respondent Roberta Florence." The complaint further alleged that Bobbe was an *alter ego* to Custom; Concepts in Drapery was an *alter ego* to Bobbe and Custom; and "Respondents" Custom, Bobbe, and Concepts in Drapery were "employers" engaged in commerce within the meaning of the Act. Also, the complaint alleged that at all material times Frank Florence was president of "Respondent" Custom and an agent and supervisor of "Respondents" Custom, Bobbe, and Concepts in Drapery; and that at all material times Roberta Florence was president of and an agent and supervisor of "Respondents" Bobbe and Concepts in Drapery. The complaint further alleged that "the Respondents" had violated the Act by, *inter alia*, unilaterally changing existing wage rates, benefits, and conditions of employment by failing and/or ceasing to make payments into, and discontinuing, the pension and insurance plans described in a collective-bargaining agreement between Custom and the Union.

About May 23, 1975, a single answer was filed to both April 30 complaints. This answer was captioned "Respondent's Answer to Complaint"; stated that Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence" would be collectively referred to as "Respondent"; and contained averments ascribed to "Respondent." The end of the answer names

Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence," and is signed by counsel as "[t]heir" attorney. By letter to the Regional Director dated June 24, 1975, counsel stated, *inter alia*, "On behalf of the Respondents . . . we hereby withdraw the 'Respondent's Answer to Complaint.'" On June 30, 1975, William G. Kocol, counsel for the General Counsel, filed a motion for an order transferring the proceeding to the Board and for summary judgment. The motion stated, *inter alia*, that "the Respondent" had filed and then withdrawn an answer, and that, if the Board issued an order transferring the case to itself, Kocol intended to file a supplemental brief as to an appropriate remedy.

On July 8, 1975, the Board issued an order transferring the proceeding to itself and a Notice To Show Cause why the Motion for Summary Judgment should not be granted. The order stated that the complaints alleged unfair labor practices by "Respondents," that an answer had been filed by "Respondents," and that "Respondents" had subsequently withdrawn "their" answer. The affidavit of service of this document states, *inter alia*, that copies were served by regular mail on Custom, Bobbe, Concepts in Drapery, Frank Florence, and Roberta Florence, respectively. No party filed a response to the Notice To Show Cause. Kocol filed a brief which sometimes referred to the opposing party as "Respondents" but at one point referred to "the doubtful continued viability of Respondent's business operation were it to incur" certain additional expenses, and requested that "the Board order Respondents to offer employment at its [sic] Chicago, Illinois, facility to those employees who were employed at the Zion, Illinois, facility, and to pay backpay until such offer of reinstatement." The certificate of service attached to this brief avers that copies were mailed to, *inter alia*, Custom, Bobbe, Concepts in Drapery, Frank Florence, and Roberta Florence, respectively.

On October 14, 1975, the Board issued a Decision and Order, reported at 220 NLRB 1256, in these three cases. The Decision initially stated that Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence [are] herein called the Respondent." The Decision went on to state that the complaints alleged unfair labor practices by "Respondent." The Board then stated that the action of "Respondent" in withdrawing its answer meant that the allegations of the complaint must be deemed admitted. Part I of the Board's "Findings of Fact," headed "The Business of the Respondent," refers by name to Custom, Bobbe, and Concepts in Drapery, but does not refer by name to Frank Florence or Roberta Florence. Nor are the Florences referred to by name in any of the other findings of fact, which usually refer to "Respondent" in the singular but sometimes use the plural. Part V of the Decision, entitled "The Remedy," states, *inter alia*, that backpay and contributions to the pension and insurance plans are to be paid by "Respondent." The Board's Conclusions of Law state that Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence, is an employer engaged in commerce within the meaning of" the Act. These Conclusions of Law further state that "Re-

<sup>1</sup> The word "its" is used as a pronoun for "Respondents" in other portions of the complaint as well.

spondent" had engaged in certain unfair labor practices which included refusal to make payments to the pension and insurance plan as provided in the collective-bargaining agreement with the Union and the termination of and failure and refusal to offer reinstatement to employees. The Board's Order states, in part:

Respondent, Custom . . . Bobbe . . . Concepts in Drapery . . . its officers, agents, including Frank Florence and Roberta Florence, successors, and assigns, shall:

\* \* \* \* \*

[2](d) Pay into the pension plan and insurance plan all due and owing payments and contributions as provided in the collective-bargaining agreement with the Union.

(e) Offer all employees in the appropriate unit who were terminated at its Zion, Illinois, facility employment at its Chicago, Illinois, facility, paying their travel and moving expenses if they accept the offer of employment, and make said employees whole for any losses they incurred by reason of the discrimination against them in accordance with the section of this Decision entitled "The Remedy."

Paragraphs 2(g) and (h) of the Order required the posting and mailing of notices. Each notice was to bear the typewritten names of Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence," and contained a blank to be executed by "Representative" and "Title." The affidavit of service of this Decision indicates, *inter alia*, that copies were sent by regular mail to Custom, Bobbe, Concepts in Drapery, Frank Florence, and Roberta Florence, respectively.

On July 19, 1976, the Board, by Deputy Associate General Counsel Elliott Moore, filed with the Court of Appeals for the Seventh Circuit an "Application for Summary Entry of a Judgment Enforcing the Board's Order." Frank Florence and Roberta Florence were not named in the caption of the application, which designates Custom, Bobbe, and Concepts in Drapery as "Respondent." The body of the application states that the Board's order had been issued against "Respondent, Custom . . . Bobbe . . . Concepts in Drapery Design, Inc., and their agents Frank Florence and Roberta Florence, its officers, agents, successors, and assigns." The application requested a judgment against "Respondent, Custom . . . Bobbe . . . Concepts in Drapery Design, Inc., and their agents Frank Florence and Roberta Florence, its officers, agents, successors, and assigns." Attached to the application were copies of a proposed judgment whose caption named as "Respondent" (in addition to Custom, Bobbe, and Concepts in Drapery) "their agents Frank Florence and Roberta Florence," and which called for a judgment against "Respondent, Custom . . . Bobbe . . . Concepts in Drapery . . . and their agents Frank Florence and Roberta Florence, its officers, agents, successors, and assigns." The proposed judgment constituted an almost verbatim copy of the Board's Order. Apparently, no opposition to the application was filed. On August 23, 1976,

the United States Court of Appeals for the Seventh Circuit entered the judgment proposed by Board counsel.<sup>2</sup>

On February 17, 1977, the Regional Director issued a document entitled "Backpay Specifications and Notice of Hearing" bearing all three Board docket numbers, and naming in the caption Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence." The document recited that a Board Order had been issued against Custom "*et al.*," and that the court of appeals had "enforced in full the backpay provisions of the Board's Order." The document contained certain allegations regarding the amount due from "Respondent," including allegations regarding the amount owed to each discriminatee and to the Union's pension and welfare fund. The total amount claimed was \$35,791.90, plus interest. So far as relevant here, the affidavit of service states that the "Backpay Specifications" was served solely on "Custom Manufacturing Company c/o Frank Florence & Roberta Florence," and on a member of the law firm Goodman and Goodman, Ltd. By letter dated February 18, 1977, which recited the docket numbers of all three cases, this law firm advised the Regional Director that it did not represent "the Respondent." By telegram dated March 18, 1977, counsel for the General Counsel advised Frank and Roberta Florence that an answer to the backpay specifications had been due on March 8, 1977, and that failure to file an answer immediately would necessitate the filing of a Motion for Summary Judgment.<sup>3</sup> By letter dated March 22, 1977, to "Frank Florence & Roberta Florence/Frank Florence & Associates . . . Dear Mr. & Mrs. Florence," Carl Tominberg, counsel for the General Counsel, stated:

. . . your answer to the Backpay Specification was due on March 8, 1977. Unless you file your Answer immediately I will be forced to move for Summary Judgment. To the extent that your Answer fails to deny the allegations of the Backpay Specification . . . you shall be precluded from introducing any evidence [controverting such allegations.]

No response to the backpay specifications was filed. On April 6, 1977, Tominberg filed with the Board a "Motion To Transfer Proceedings to the Board and Motion for Summary Judgment." The caption of the motion named Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence." The body of the motion requested summary judgment, for failure to file an answer to the backpay specifications, against Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence." So far as relevant here, the affidavit of service

<sup>2</sup> Thereafter, the clerk of the court returned the original appeal record to the Board. The clerk's covering letter, dated February 25, 1977, states that the title of the cause is "National Labor Relations Board, Petitioner, Custom Manufacturing Company, etc., *et al.*, Respondents."

<sup>3</sup> The copy of this telegram in the Board's formal file in Washington, D.C., is almost illegible. My description is based mostly on the description in the Board's 1977 Supplemental Decision and Order herein (230 NLRB 691) and on the description in the General Counsel's April 1977 Motion for Summary Judgment. The Board's Decision states that the General Counsel "telegraphically advised Respondent's agents, Frank and Roberta Florence."

with respect to this motion named only "Custom Manufacturing Company c/o Frank Florence and Roberta Florence." On April 20, 1977, under the same caption and with the same docket numbers as those set forth in the motion, the Board transferred the proceedings to itself and directed that cause be shown before May 4, 1977, why the Motion for Summary Judgment should not be granted. So far as relevant here, the affidavit of service states that the show-cause notice was mailed by registered mail to "Custom Manufacturing Company c/o Frank Florence and Roberta Florence" only and by regular mail to Bobbe and Concepts in Drapery.

No response was filed to the April 20, 1977, show-cause notice. On July 7, 1977, the Board issued a Supplemental Decision under the same caption and with the same docket numbers as those in the April 6, 1977, motion. 230 NLRB 691. The Decision stated, *inter alia*, that the Board's October 1975 Order had directed that Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence, herein called the Respondents, make whole certain employees and the [Union's] pension and insurance fund." In view of the absence of any response to the General Counsel's motion and the Board's show-cause notice, the Board found the allegations of the backpay specifications to be true.<sup>4</sup> The Board's ruling on the Motion for Summary Judgment states, *inter alia*, that the Board "orders the payment [of the amounts set forth in the Specifications as net backpay and as payments due and owing to the contractual pension plan] jointly and severally by Respondents." The Order itself states, in part:

[T]he National Labor Relations Board hereby orders that the Respondents, Custom . . . Bobbe . . . Concepts in Drapery . . . and their agents Frank Florence and Roberta Florence, make whole the discriminatees named below, by payment to them of the amount following their names and by payment to the [union] pension plan . . . the amount following its name.

So far as relevant here, the affidavit of service of this Supplemental Decision and Order recites that copies were served on Custom "c/o Frank Florence & Roberta Florence," Bobbe, and Concepts in Drapery.

On March 19, 1979, Deputy Associate General Counsel Moore filed on behalf of the Board an application to the Seventh Circuit for a supplemental judgment enforcing the Board's July 1977 Order. The caption named as "Respondents" Custom, Bobbe, Concepts in Drapery, and their agents Frank Florence and Roberta Florence.<sup>5</sup> The application stated that the 1977 Board Order had been issued against "Respondents, Custom . . . Bobbe . . . Concepts in Drapery . . . and their agents Frank Florence and Roberta Florence." Further, the application stated that the Board had ordered "Respondents, Custom . . . Bobbe . . . Concepts in Drapery . . . and their agents Frank Florence and Roberta Florence" to

make whole the discriminatees by payment to them of "the amount following their names and by payment to the [Union] pension plan . . . the amount following its name." Also, the application alleged that "the Respondents" had committed unfair labor practices. The application requested a supplemental judgment summarily enforcing the Board's 1977 Order, and requiring "Respondents, Custom . . . Bobbe . . . Concepts in Drapery . . . and their agents Frank Florence and Roberta Florence" to comply therewith. So far as relevant here, the certificate of service with respect to this application recites service on the law firm Dorfman, DeKoven, Cohen, and Laner (described in the certificate of service as counsel for "Respondents"); Custom "c/o Frank Florence & Roberta Florence," Bobbe; and Concepts in Drapery. On April 20, 1979, the Seventh Circuit entered a "Supplemental Judgment Enforcing a Supplemental Order of the National Labor Relations Board." This judgment, in the form requested by Board counsel, named in the caption "Custom . . . Bobbe . . . [Concepts] in Drapery . . . and their agents Frank Florence and Roberta Florence, Respondents"; and required "Respondents, Custom . . . Bobbe . . . Concepts in Drapery . . . and their agents Frank Florence and Roberta Florence [to] make whole the discriminatees named below, by payment to them of the amount following their names and by payment to the [union] pension plan . . . the amount following its name."

## II. THE INSTANT PROCEEDING

### A. Jurisdiction; Matters Established by the Pleadings

On May 16, 1980, the Acting Regional Director issued the backpay specification and notice of hearing which gave rise to the proceeding before me. The specification alleged, *inter alia*, that Interior was an *alter ego* of Custom, Bobbe, and Concepts in Drapery and was obligated to pay to the employees and the Union funds the sums specified in the Board's July 1977 Order and the Court's 1979 judgment. On June 2, 1980, Attorneys Richard L. Marcus and Irving M. Geslewitz, on Interior's behalf, filed a motion to dismiss the May 1980 backpay specification for lack of jurisdiction.<sup>6</sup> Interior asserted that the Court's April 1979 judgment was final and did not remand the proceedings to the Board, and that the Board had failed, before issuing the May 1980 backpay specification, to apply to the court for leave to adduce additional evidence that Interior was an *alter ego* of the other three corporations. Further, the motion asserted that the Board's Rules and Regulations do not provide for a proceeding of the nature described in the May 1980 backpay specification. On July 31, 1980, this motion was denied by Administrative Law Judge William A. Gershuny on the authority of *N.L.R.B. v. C.C.C. Associates, Inc.*, 306 F.2d 534 (2d Cir. 1962). See also *Coast Delivery Service, Inc.*, 198 NLRB 1026 (1972).

<sup>4</sup> In the form signed by the Board members, the Supplemental Decision states, *inter alia*, that "Respondents [sic] counsel's law firm advised that it no longer represented the Respondents." (As printed in the Board's bound reports, the first word in the quoted material is Respondents'.) The letter in fact referred to "the Respondent."

<sup>6</sup> The face of this May 1980 backpay specification indicates that efforts were made to serve, *inter alia*, Concepts in Drapery, Custom, and Bobbe "c/o" the Florences, and the Florences individually. None of these was named in the certificates of service filed by Interior's counsel in connection with his motion and reply memorandum.

The caption of the May 1980 backpay specification set forth the docket number of all three cases and named Custom; Bobbe; Concepts in Drapery; "and their agents Frank and Roberta Florence"; and "Interior Concepts, Inc., and its agents Terry Sterling, Frank and Roberta Florence." The backpay specification alleged, *inter alia*, that in October 1975 the Board had ordered "Custom, Bobbe, Concepts [in Drapery], their agents Frank and Roberta Florence, and successors and assigns" to pay into the pension plan and the insurance plan all due and owing payments, and to make whole employees who had been discharged from the Zion, Illinois, facility for any losses they incurred as a result of "Respondent's" discrimination against them. The backpay specification further alleged that the Board's July 1977 Supplemental Decision and Order ordered "Respondents Custom, Bobbe, Concepts [in Drapery] and their agents Frank and Roberta Florence" to make payments totalling \$35,791.90, plus interest to 10 named employees and the Union's insurance and pension funds "for Respondents [sic] violations" of the Act. In addition, the backpay specification alleged that Bobbe and Concepts in Drapery were successive *alter egos* of Custom, and that "[T]he Florences by Roberta Florence and/or by Frank Florence have been, at all times material herein, shareholders of 50 percent or more of the stock in Custom, Bobbe, and Concepts [in Drapery], and, at all times material herein, were controlling owners or the owner of Custom, Bobbe, and Concepts [in Drapery]." Attorney Geslewitz filed an answer to the backpay specification as Interior's attorney, in which answer he admitted all the allegations set forth in this paragraph except the *alter ego* allegations.<sup>6</sup> At the hearing before me, Attorney Geslewitz appeared on behalf of Interior and on behalf of the Florences in their capacity as its agents. Geslewitz then admitted the *alter ego* allegations set forth in this paragraph.

*B. The Businesses Operated by Custom, Bobbe, Concepts in Drapery, and Interior*

1. Custom

Custom was organized in 1967 and incorporated in 1969, several years before the marriage of Frank and Roberta Florence. Initially, Frank Florence owned all of Custom's stock. In 1972, one Ben Rubin bought 50 percent of Custom's shares. Until 1973, Custom was located on Western Avenue in Chicago, Illinois. During this period, Custom was a profitable operation. In July 1973, Custom leased, and moved its entire operations to, a Zion, Illinois, plant previously occupied by the drapery division of Zion Industries, Inc. Custom did not purchase the plant building in Zion, about 25 miles from Chicago, but did purchase Zion Industries' equipment, sewing equipment, inventory, and fixtures. In addition, Custom moved its Chicago equipment to the Zion plant. In order to obtain capital to purchase and operate the business in Zion, Custom borrowed \$150,000 from Continental Illinois Bank (Continental). To secure this loan, Continental

retained a security interest in all of Custom's assets, including its inventory, fixtures, machinery, and accounts receivable. The loan was personally guaranteed by Rubin, his wife, and Frank Florence.<sup>7</sup>

When operating the plant, Zion Industries had had a collective-bargaining agreement with the International Chemical Workers Union, Local 665 (the Union) covering factory and warehouse employees. Custom hired about 50 of these former Zion Industries employees, recognized the Union, and either assumed the existing collective-bargaining contract or executed a new one. The Board found in the unfair labor practice proceeding that Custom entered into a collective-bargaining agreement effective from July 1, 1974, to June 30, 1976 (220 NLRB at 1257-58). The unopposed February 1977 backpay specification states that in July 1973 "Respondent ceased" making payments into the Union's pension and welfare fund.

Frank Florence was Custom's president and treasurer, and directed Custom's business on a day-to-day basis. In August 1973, Terry Sterling became Custom's salaried controller and office manager, in which capacities he "sat in on most of the labor relations," oversaw the billing and the invoices, had the orders processed, kept track of making payments on payables, made credit information, and organized the office. He was never an officer or shareholder in Custom, and is no kin to the Rubins or the Florences.

Between 85 and 90 percent of Custom's business consisted of manufacturing draperies from its own fabrics to be hung in private residences. The homeowner would select a fabric from a sample on display at Custom's factory or (more often) at a retail store. If the selection was made at a retail store, a salesperson would take down the customer's dimension and fabrication specifications and forward the order to Custom, which would make the draperies and bill the store. Inferentially, the store had to pay Custom whether the homeowner paid the store or not. If the selection was made at Custom's own factory, someone from Custom's office would take down the measurements. Custom would then manufacture the draperies and bill the homeowner directly. On occasion, Custom's employees would also install the draperies. Custom did not sell raw fabric, but on occasion, if a customer wanted a set of draperies and also wanted a few yards of the drapery material to make something else, Custom would include that yardage as part of the sale. About 10 to 15 percent of Custom's business came from Benjamin Brothers, Custom's only nonretail customer. Benjamin Brothers is a hotel furnishing supplier which puts together packages of furniture, fixtures, draperies, and other items which would go into the rooms of a hotel which is being opened up, remodeled, or refurbished. As described in greater detail *infra*, section II,B,4, the fabric for draperies ordered by Benjamin

<sup>6</sup> The certificate of service attached to this answer names only the union representative.

<sup>7</sup> The Florences were married in 1972. Roberta Florence had received moneys from her former husband, who was killed in an accident, and had to raise three children from that marriage. Frank Florence told Continental that, because of these circumstances, he would not "allow" his wife to sign on the loan. Continental agreed.



Brothers was supplied by it to Custom, which fabricated and installed them.

According to a partly unaudited statement by Custom's accountants, between Custom's commencement of operations in July 1973 and May 31, 1974, Custom lost over \$117,000.<sup>8</sup> About June 1974, Continental asked Custom to set up a collateral account into which all accounts receivable moneys were to be directly deposited, to discontinue purchasing any more inventory, and to reduce Custom's receivables and inventory. Custom agreed. Funds were transferred by Continental from this collateral account to cover Custom's payroll and other necessary expenses, but the bulk of the money in this account was retained by Continental to pay Custom's note, mostly the interest. Frank Florence testified that, at the end of June 1974, 50 percent shareholder Rubin, who is no kin to either of the Florences, "skipped out . . . he just took off like a bird . . . I could kill him."

About this same time, Continental said that, because of the amount of money which Custom owed to its landlord, to Zion Industries, and to others, it would be best to continue operating as a newly formed corporation. In July or August 1974, Custom as such went out of business, and all the employees were "let go."<sup>9</sup> On an undisclosed subsequent date, Custom was dissolved as an Illinois corporation.

During the calendar year 1974, Custom lost more than \$200,000. During that calendar year, Frank Florence, who devoted his full time to the business, and Rubin, who according to Custom's tax return also did so, received as salaries from Custom \$12,287 and \$12,000, respectively.

## 2. Bobbe

The new corporation formed because of Continental's request (and, according to Frank Florence, because "we felt it was maybe a way to start up new business") was Bobbe. Because of Custom's losses and Frank Florence's personal guarantee of Custom's debt to Continental, he had no money and all of Bobbe's capitalization was provided by his wife, Roberta, who incorporated Bobbe and owned all the stock. Roberta Florence was Bobbe's president but took no active role in the business. Frank Florence was Bobbe's vice president and secretary and managed it on a daily basis. Sterling was Bobbe's salaried controller and office manager, in which capacities he performed the same duties, including labor relations duties, which he had performed for Custom. He was never an officer of Bobbe. Bobbe operated from the same plant in Zion as Custom had, and, with Continental's permission, used machinery which had been pledged by Custom but had not yet been sold. Bobbe, like Custom, manufactured and sometimes installed made-to-

<sup>8</sup> Interior's brief attributes Custom's losses "primarily" to the difficulty in training the former Zion employees to operate the automatic equipment brought over to Zion. While Custom did have such difficulties in connection with training employees, the record fails to show the extent to which such training problems contributed to Custom's losses over a period of 10 months.

<sup>9</sup> This was not the termination action found unlawful in the unfair labor practice case. Further, because the amount due to the union funds is based upon hours worked, no part of the required payments into these funds is attributable to the period covered by this 1974 separation.

measure draperies. However, because Bobbe had no money with which to maintain an inventory, Bobbe manufactured draperies from fabric supplied by the customer. Of Bobbe's four suppliers, three had been suppliers of Custom. Although Bobbe had fewer customers than Custom, practically all Bobbe's customers had also been customers of Custom. Among these retained customers was Benjamin Brothers, which represented a substantial part of Bobbe's business. With the Union's "permission," Bobbe recalled on various dates between August 10 and November 2, 1974, about 14 of the approximately 51 unit employees laid off by Custom. Also, Bobbe hired one bargaining unit employee (John Popelka, a warehouse employee) who had not been on Custom's payroll when it shut down; recalled two installers (Trinidad Soria, who is Frank Florence's son-in-law, and Steven Scalf) who had worked for Custom in nonunit jobs; and recalled as a supervisor Mildred Popelka, who had been a supervisor for Custom. The Board in effect found in the unfair labor practice proceeding that Bobbe was bound by the July 1974 collective-bargaining agreement; but the unopposed February 1977 backpay specification alleged that, while Bobbe was in operation, no payments were made into the contractually described pension and welfare funds. As previously noted, the November 1974 charge herein names Custom and complains of the failure to make such payments.

Bobbe's operations lost money. Continental asked the Florences to sell off whatever equipment they could and to move operations from Zion to a smaller space. As proffered reasons for this request, Continental expressed fear that Bobbe's landlord would distrain Custom's equipment, in which Continental had a security interest, for nonpayment of rent, and further said that unnecessary utility expenses were being incurred because the Zion plant was much larger than was needed for the curtailed manufacturing operation. Much of the remaining equipment was sold, and, with Continental's permission, the unsold equipment was moved to a plant on Schubert Avenue in Chicago. In February 1975, Bobbe surrendered its corporate charter to the State of Illinois. During the 6 months Bobbe was in business as such, Frank Florence received \$13,605 and Roberta Florence received nothing. Roberta Florence had invested \$5,000 in the business, and its losses amounted to about \$4,300.

## 3. Concepts in Drapery

When operations were moved from Zion at Continental's request, a new corporation, Concepts in Drapery, was set up in February 1975 to operate the business while it was located on Schubert Avenue. Roberta Florence furnished all the capital, owned all the stock, was the corporate president, took an active management role, and worked parttime preparing all the invoices and handling all the billing functions. Frank Florence was vice president and secretary or treasurer, ran the factory, and did selling on the telephone. Sterling was the salaried controller and office manager, and performed the same labor relations and other duties he had performed when on Custom's and Bobbe's payrolls. In addition, he helped run the factory and sell off the pledged equipment. He



owned no stock in and was not an officer of Concepts in Drapery. Nor did he perform any selling for that corporation. Installers Scalf and Soria, both nonunit personnel, moved from Bobbe's to Concepts in Drapery's payroll, as did Supervisors Mildred Popelka and Ella Stewart and warehouseman John Popelka. This warehouseman was the only unit employee who was moved between these payrolls. In February and March 1975, Concepts in Drapery hired eight factory workers who had never worked in the Zion plant. The Board found in the unfair labor practice case that Section 8(a)(3) and (1) had been violated since February 1, 1975, by the termination of the Zion employees and by the failure and refusal to offer them employment in the facility on Schubert Avenue in Chicago. 220 NLRB at 1258, 1259. The unopposed February 1977 backpay specification alleged that eight named employees (all of whom had been on Custom's payroll and four of whom had been on Bobbe's payroll) would have accepted employment at the Schubert Avenue facility. The Board's judicially enforced backpay order specifies their names and the amounts due them.

Concepts in Drapery, like Bobbe, manufactured draperies from the customer's own fabric and sometimes installed them. Practically all of its customers, including Benjamin Brothers (a major customer), had been customers of Custom and/or Bobbe. Most of the suppliers of Concepts in Drapery had also been suppliers of Custom, and all of them had been suppliers of Bobbe.

As previously noted, in April 1975 the Regional Director issued complaints against Custom, Bobbe, Concepts in Drapery, "and their agents" the Florences, alleging, *inter alia*, that employees at the Zion plant had been unlawfully terminated and that economic provisions in a collective-bargaining agreement had been unlawfully dishonored. On July 8, 1975, these complaints were sustained by the Board, which ordered that the laid-off employees and the pension and insurance plans be made whole. By letter dated July 17, 1975, to Custom "c/o Concepts, Inc.," Continental formally demanded payment in full of all of Custom's remaining obligations to Continental. The amount owed consisted of more than \$110,000, plus interest. After receiving this demand letter, Concepts in Drapery's management proceeded to finish off, deliver, and install orders which were in process. On August 1, 1975, manufacturing operations were discontinued, and on or before August 4 all bargaining unit employees were permanently laid off. The unopposed February 1977 backpay specification sets forth the August 1 date as the date when amounts due as backpay and as payments into the pension and welfare funds ceased to accrue. However, after August 1, installers Scalf and Soria remained on the payroll; they installed draperies which had been manufactured by Concepts in Drapery, corrected some errors in installation, and did some repair work. Sterling and the Florences tried to collect all of Concepts in Drapery's remaining receivables, out of which they and the installers received their salaries, and also tried to collect Custom's remaining receivables. The remaining equipment was sold on or before August 4, 1975, and the proceeds were remitted to Continental via the collateral account. By October

1975, all of Custom's collectible accounts receivable were collected, and the amounts so collected were so remitted to Continental. After that time, no payments were made to Continental on the outstanding debt, which as of August 1975 totalled about \$110,000, including interest. The orders which remained unfilled when Concepts in Drapery stopped manufacturing were given to Drape-master, a competitor, which billed the customers directly and paid Concepts in Drapery nothing for the business.<sup>10</sup>

Concepts in Drapery never made any profits. After its February 1975 formation, Frank Florence received from it a total of \$9,000 and Roberta Florence received from it a total of about \$3,000.

#### 4. Interior

It is unclear from the record whether the corporate charter of Concepts in Drapery ever actually lapsed. On August 19, 1975 (2 months after the withdrawal of the answer to the unfair labor practice complaint against Custom, Bobbe, Concepts in Drapery, "and their agents" the Florences and 18 days after Concepts in Drapery ceased manufacturing operations), the Illinois secretary of state, at Frank Florence's request, issued a corporate charter to Interior. The articles of incorporation do not state that the corporation's purposes include any kind of manufacturing, but do state that such purposes include, "To sell and supply, at wholesale or retail, all kinds and descriptions of material, fabrics and all other related products incidental to the decorating of hotels, motels, residential properties, commercial and office properties."

The Florences, Sterling, and installers Soria and Scalf remained on Concepts in Drapery's payroll until the end of its last payroll period, December 29, 1975, on which date they were the only persons still working for that corporation. Interior's first payroll period did not begin until January 4, 1976, on which date its entire work force consisted solely of the five persons who had been on the payroll of Concepts in Drapery until the end of December 1975.<sup>11</sup> Moreover, Interior's acquisition of a lease at its first location, on Peterson Avenue in Chicago, did not take place until sometime in January 1976.

However, before January 1976, Concepts in Drapery personnel who were still on that corporation's payroll solicited orders and performed work for Interior. Thus, Frank Florence, who appeared to be in his fifties, testified that the only thing he had ever done in his life was to manufacture or sell draperies; that, with the early August 1975 sale of the last of Custom's pledged machinery, he knew that he would have no equipment to manufacture draperies; that by the time Interior was incorpo-

<sup>10</sup> Frank Florence and Sterling testified that they wanted to arrange for the satisfactory completion and installation of all draperies on order, partly to avoid being sued and partly to make sure of collecting the full amounts due from customers to whom only partial deliveries had been made before Continental's demand and the cessation of manufacturing operations.

<sup>11</sup> These two installers continued to work for Interior until July 1980, a month or two after the issuance of the instant May 1980 backpay specification. Thereafter, they began to work for a firm called Complete Drapery Service, which Frank Florence testimonially described as "the new company." The record contains no other information about Complete Drapery Service.

rated in mid-August, he knew it was going to be a selling company in the drapery business; that obtaining the kind of business handled by Interior takes about 6 to 8 months; and that he and Sterling began looking for such business "probably [in] September, October, November." In addition, Interior's records reflect that Benjamin Brothers was billed on December 3, 1975, for certain services, and that, ordinarily, this customer would not be billed until after the services were performed.<sup>12</sup> Also, Interior's records show that Slater Company, an office supply company, was billed for various amounts on December 4 and 9, 1975, and on January 7 and 13, 1976; and that it would have been billed before services were performed.<sup>13</sup> Further, Interior's records disclose two additional orders, billed respectively on November 3, and December 3, 1975, for customers who would ordinarily have been billed before services were performed. These were Interior's only orders billed before January 1976. However, Frank Florence testified that in late 1975 he "probably" solicited orders for Interior from some prospective customers who did not order anything. Furthermore, Frank Florence testified, and Interior's brief states (pp. 12-13), that by October 1975 all of Custom's collectible accounts receivable had been collected. Also, Frank Florence testified that the process of winding down the orders received by Concepts in Drapery was "pretty well finished by October" 1975. In view of the foregoing testimony by Frank Florence and the largely documentary evidence regarding Interior's billings between early November 1975 and early January 1976, and for demeanor reasons, I do not accept Frank Florence's testimony that in November and December 1975 Sterling and the Florences were "basically" collecting receivables for Custom and Concepts in Drapery, or Sterling's testimony that, from the time Concepts in Drapery ceased production until the end of 1975, Frank Florence simply collected all the remaining accounts receivable. For similar reasons, I do not accept Sterling's testimony that, for 5 to 6 months before Interior was started up, "pretty much" all his working time was taken up by collecting receivables; taking down, moving, and setting up the equipment which had been sold; doing "paper work"; and packing and moving records.<sup>14</sup> Rather, I find that at least by early October, while still on the payroll of Concepts in Drapery, Sterling (who admittedly did selling for Interior) and Frank Florence were spending a substantial amount of time in soliciting business for Interior.

At the time of Interior's incorporation, Roberta Florence owned 75 percent of Interior's stock and Sterling owned 25 percent. Thereafter, Sterling annually acquired from Roberta Florence 6 percent of the outstanding stock; at this rate, Sterling would not have acquired a

controlling interest in the corporation until 1981, and would not have acquired all the stock until about 1989. In June 1980, after the issuance of the instant backpay specification seeking to render Interior liable for the more than \$35,000 in question, Sterling purchased all of Roberta Florence's remaining stock, which was thereupon put in escrow for her inferentially until Sterling paid for it. Also in June 1980, Frank and Roberta Florence withdrew from their corporate offices as Interior's treasurer (possibly) and vice president, respectively. Sterling has at all times been president of Interior, and also performs selling functions for it. As president, he takes care of all credit arrangements for jobs, checks the contracts, verifies estimates, makes collections, and makes sure the job orders are processed to the salesmen. Frank Florence has at all times worked for Interior as a salesman. His 1976 salary was \$26,000, substantially more than he had received during his last year on Custom's payroll or when he was on the payroll of Bobbe or Concepts in Drapery. By the end of 1979, Frank Florence was being paid at the rate of \$44,800 a year (the same rate as Sterling) and Roberta Florence, who took no management role in Interior but has at all times worked in Interior's office, was being paid at the rate of \$12,600 a year. As of November 1980, Interior's sales averaged \$150,000 a month.

Interior has never manufactured draperies or any other product, employs no production or maintenance employees, and has never had any factory or workshop area nor any space for establishing such an area. The only machinery owned by Interior is office machinery and its only nonmanagerial personnel are salespersons, office workers, and installers. Interior is a contractor and subcontractor which receives orders from various commercial enterprises and fills such orders by obtaining products manufactured by others. As of the November 1980 hearing, about 30 percent of Interior's total volume consisted of the sale and installation of draperies and an additional 30 percent consisted of the sale and (inferentially) installation of what Interior President Sterling described as "related products"—that is, such products as blinds, shades, and woven woods. As of that date, the remaining 40 percent of Interior's volume consisted of building specialty products—for example, washroom equipment sold to general contractors; projection screens sold to schools and audio visual areas; grab bars and "I.V." and cubicle tracks sold to hospitals; and ashtray urns, medicine cabinets, and mailboxes sold to the construction industry. In addition, Interior sells to some of its customers, at a profit, raw fabric which Interior has purchased from other firms. Advertising distributed by Interior to its customers does not name any manufacturers or suppliers of draperies, but does name the manufacturers or suppliers of a number of building specialty products available through Interior. Where the products ordered from Interior consist of draperies, Interior customarily measures the job; orders the drapery rods; selects a fabric and a fabric supplier; orders the desired fabric sent to a drapery fabricator, which fabricates the draperies; schedules the installation; takes the rods and draperies out to the jobsite; and installs them. Interior's

<sup>12</sup> The first page of Interior's accounts receivable ledger for Benjamin Brothers sets forth amounts due from Benjamin Brothers to Concepts in Drapery for September and October 1975 billings.

<sup>13</sup> Sterling testified that Interior stopped doing business with Slater because of credit problems, and eventually wrote off what Slater still owed as a bad debt. The ledger shows that Interior obtained business from Slater between early December 1975 and August 1977, during which period Slater paid Interior about \$19,730. The bad debt, written off in February 1978, amounted to about \$448.

<sup>14</sup> The records of Custom, Bobbe, and Concepts in Drapery were stored on Interior's premises.

profit is obtained from putting this "package" together. Sterling testified that the number of draperies specified on a single order handled by Interior is much larger than the number specified on a single order filled by Custom, Bobbe, and Concepts in Drapery; an Interior order might call for 150 or 200 pairs of draperies all the same size, while a single order filled by Custom, Bobbe, and Concepts in Drapery would amount to draperies for a single private home or a single room in such a home. As to the number of draperies called for by an order handled by the old corporations, Sterling did not specifically except Benjamin Brothers; but, because Benjamin Brothers is a hotel supply firm, I infer that at least on occasion it ordered many more draperies than would be specified on an order proceeding from a homeowner.

Whereas the customers of Custom, Bobbe, and Concepts in Drapery were mainly large department stores and other retail outlets, Interior's customers are largely commercial and institutional users, such as construction companies, office buildings, hospitals, universities, and government agencies. Of Interior's approximately 74 customers (about 25 of which it acquired before July 1976), only one, Benjamin Brothers, had been a customer of Custom, Bobbe, or Concepts in Drapery. As of November 1980, Benjamin Brothers provided Interior with 10 percent of Interior's business. When doing business with Custom (which ordinarily manufactured draperies from its own fabrics) as well as Bobbe and Concepts in Drapery (both of which always manufactured draperies from fabric supplied by the customer), Benjamin Brothers had provided the material for the draperies. When doing business with Benjamin Brothers, Custom, Bobbe, or Concepts in Drapery would measure the windows, determine whether new rods were required, and advise Benjamin Brothers of the yardage requirements. Then Benjamin Brothers would order the material and send it to Custom, Bobbe, or Concepts in Drapery for fabrication and installation. When doing business with Interior, whose business with Benjamin Brothers as of November 1980 had been limited to draperies, Benjamin Brothers orders the material (at least sometimes from the source recommended by Interior) and sends it to a fabricator (usually and perhaps always the fabricator recommended by Interior), which fabricator bills Benjamin Brothers directly for fabrication. Interior's responsibility is to make sure that the job is completed and acceptable to Benjamin Brothers' hotel customer. Interior's responsibilities include the installation of the draperies, which had also been done by Custom, Bobbe, and Concepts in Drapery when they did business with Benjamin Brothers.

Of Interior's approximately 59 suppliers, about 6, including Benjamin Brothers, had been suppliers for Custom, Bobbe, and/or Concepts in Drapery. Kirsch, one of these six, is one of the largest curtain rod manufacturers in the country, and the kinds of curtain rods purchased from it by Interior are different from the kinds purchased from it by Custom, Bobbe, and Concepts in Drapery. Draperies purchased by Interior are made of materials which meet commercial code fire retardance standards; whereas draperies manufactured by Custom, Bobbe, and Concepts in Drapery were made of decorative materials. Four of Interior's suppliers had been com-

petitors of Custom, Bobbe, and Concepts in Drapery; one of these former competitors was Drapemaster, to which Concepts in Drapery had transferred some of its orders without cost.

No assets were ever transferred from Custom, Bobbe, or Concepts in Drapery to Interior or the Florences.

### C. Analysis and Conclusions

"To determine whether one legal entity is the *alter ego* of another, the Board looks to the ownership, management, business purpose, operation, equipment, customers, and supervision of the two businesses. Where some of these listed indicia are 'substantially identical,' the Board will find an *alter ego* status. However, not all of these standards have to be satisfied; centralized control of labor relations or identical corporate ownership is not crucial to the finding of an *alter ego*." *Blake Construction Co., Inc./M & S Building Supplies, Inc.*, 245 NLRB 630, 634 (1979). See also, *Crawford Door Sales Co., Inc.*, and *Cordes Door Company, Inc.*, 226 NLRB 1144 (1976); *N.L.R.B. v. Tricor Products, Inc. and/or C & J Pattern Co.*, 636 F.2d 266 (10th Cir. 1980).

The Board has held that a finding of *alter ego* status requires the presence of substantially identical ownership between the enterprises in question. *Clinton Foods, Inc., d/b/a Morton's I.G.A. Foodliner*, 240 NLRB 1246, fn. 2 (1979), *affd.* in this respect 663 F.2d 223 (D.C. Cir. 1980). I agree with the General Counsel that this ownership criterion is met here. Thus, at the time Interior began operations in January 1976, 75 percent of its stock was owned by Roberta Florence, who owned all of the stock of Bobbe and Concepts in Drapery and whose husband owned half of Custom's stock. Interior does not appear to dispute that it met the "substantially identical ownership" criterion as of January 1976. *Blake Construction, supra*; *Crawford, supra*; *Sturdevant Sheet Metal & Roofing Co., Inc., et al.*, 238 NLRB 186, 187-188 (1978). Interior does contend that the effect of Roberta Florence's stock ownership on Interior's status with respect to the other three corporations has been nullified by Sterling's purchase, after Interior received the instant May 1980 backpay specification seeking to hold it answerable for the sums owed by the old corporations, of all the stock still owned by her. Further, Interior points out that even before this purchase, Sterling already owned 44 percent of Interior's stock. However, assuming that when it began operations Interior was answerable for the backpay and union fund payments which were owed by the old corporations and which had been tolled before Interior's incorporation, Interior would not be absolved of liability because of subsequent changes in the identity of its stockholders. *Gateway Service Co.*, 209 NLRB 1166 (1974); *Topinka's Country House, Inc.*, 235 NLRB 72, 73-74 (1978); *Miller Trucking Service, Inc., and/or Miller Trucking Service, Inc., a Subsidiary of Tulsa Crude Oil Purchasing Company*, 176 NLRB 556 (1969), approved in this respect 445 F.2d 927, 930 (10th Cir. 1971). Moreover, if Sterling fails to pay for the stock, its ownership will revert to Roberta Florence.

Furthermore, there has been substantial identity of management in the four corporations. Frank Florence

was an officer in Custom, Bobbe, Concepts in Drapery, and (for a period which ended after the 1980 issuance of the instant backpay specification) Interior. He managed the first three corporations on a day-to-day basis; performed selling functions for all four corporations;<sup>15</sup> incorporated Interior; and, by the end of 1979, was receiving the same salary from Interior as did Interior President Sterling. Moreover, when serving as salaried controller and office manager for Custom, Bobbe, and Concepts in Drapery, Sterling had duties which included sitting in on most of the labor relations, overseeing the billing, having orders processed, keeping track of making payments on payables, collecting receivables, making credit collection information, and organizing the office. While it is true that he performed selling functions for Interior but had not done so for Concepts in Drapery or (so far as the record shows) the other two corporations, the record directly shows that as Interior's president he continues to make collections and takes care of all credit arrangements for jobs; and I infer that as Interior's president he continues to perform or supervise at least some of the other functions he previously performed as the other corporations' controller and office manager.

Furthermore, Sterling and Frank Florence solicited and obtained business for Interior while they were still on the payroll of Concepts in Drapery and before Interior formally began operations. Also, one of Interior's first customers was Benjamin Brothers, which had been a customer of Custom and a major customer of Bobbe and Concepts in Drapery, and to which Interior provided substantially the same services (except fabrication) which Benjamin Brothers had received from the other three corporations. In addition, Roberta Florence handled all the billing functions for Concepts in Drapery and then for Interior. Moreover, the Florences, Sterling, and the two installers, who constituted the entire final payroll of Concepts in Drapery, were transferred to Interior's payroll without any break in their employment.

However, countervailing considerations lead me to conclude that the record fails preponderantly to show that Interior occupies *alter ego* status with respect to the other three corporations. Thus, the evidence fails to show that Interior was set up for a purpose of evading the labor law responsibilities of Custom, Bobbe, and Concepts in Drapery.<sup>16</sup> Further, there was no transfer of assets from Concepts in Drapery to Interior.<sup>17</sup> Also, Inte-

rior has never employed any production employees, the kind of employees with respect to whom the other three corporations' unfair labor practices were committed. Moreover, Interior's facilities are much smaller than and have a location different from those of the other corporations. In addition, except for Benjamin Brothers, Interior's customers are all different from the other three corporations' customers and are all in different kinds of businesses; and most of Interior's suppliers are different from the suppliers of the other three corporations and many are in different kinds of businesses. Finally, while the principal business of the other three corporations was the manufacture of draperies to be used in private residences (which business included their sale and installation), Interior's business consists of the sale to institutions and commercial establishments of products manufactured by others, with about 30 percent of its volume consisting of the sale and installation of draperies and about 30 percent consisting of the sale and installation of related products. Cf. *Co-Op Trucking Co., Inc., and C & E Warehouse, Inc., and S & S Trucking Co., a Partnership*, 209 NLRB 289, 830-831 (1974).

The General Counsel's able brief seeks to minimize the significance of the differences between Interior's business and the business of the other three corporations on the ground that Interior "is today the business enterprise that Custom would have become if there had been no technical changes in corporate form . . . the change from Concepts [in Drapery] as a seller of labor to Interior as a broker of other companies' materials was . . . dictated by Continental Bank's demands . . . resulting in the sale of all the remaining manufacturing equipment. All that Concepts [in Drapery] had left went to Interior—business knowledge, expertise in the drapery products field, an important customer—Benjamin Brothers—to begin in the commercial area of the drapery products field, and a few months of time and payroll to begin development of this new aspect of the drapery business. The changes in business operations that . . . finally resulted in Interior's business operations would have occurred regardless of any changes in corporate form and could have been handled within the corporate framework of Custom, Bobbe, or Concepts" in Drapery.<sup>18</sup> However, almost any small corporate owner who has lost all his assets in a prior unfortunate corporate venture will seek to improve his economic future by taking advantage of his previously acquired expertise and business contacts and of any time left over from winding down the affairs of his failed business. In the circumstances of this case, I conclude that such activities by Frank Florence did not render Interior an *alter ego* of the other three corporations. The

<sup>15</sup> The record directly shows this for Concepts in Drapery and Interior only. However, from his testimony in this connection and the probabilities of the situation, I infer that he also performed at least some selling functions for Custom and Bobbe.

<sup>16</sup> However, I do not agree with Interior that such a showing is essential to an *alter ego* finding. *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO*, 417 U.S. 249, 259, fn. 5 (*alter ego* cases involve "a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management"; (emphasis supplied)); *Tricor*, *supra* at 270. I need not and do not determine whether the issuance of the 1980 backpay specification, more than 3 years after Interior's incorporation, motivated the Florences' resignation from their corporate offices and the agreement for immediate sale to Sterling of Roberta Florence's stock. None of the parties to these transactions testified to the reasons therefor.

<sup>17</sup> However, I do not agree with Interior that such a transfer is essential to an *alter ego* status. See, e.g., *Dee Cee Floor Covering, Inc., et al.*, 232

NLRB 421, 426 (1977); *Marquis Printing Corporation and Mutual Lithograph Company*, 213 NLRB 394, 401 (1974). If such a transfer were necessary, it is difficult to see why Interior admitted that Bobbe and Concepts in Drapery occupied *alter ego* status with respect to each other and Custom.

<sup>18</sup> Bobbe returned its corporate charter to the State about 6 months before Interior's incorporation, and Custom's formal dissolution may also have occurred before Interior's incorporation. Further, the record fails to show whether the kind of business engaged in by Interior was wholly within the scope of any of the other three corporations' corporate charters.

cases cited by the General Counsel in this connection do not call for a different result. In *Southeastern Envelope Co., Inc.*, 246 NLRB 423, 425-428 (1979), a large part of the new corporation's work consisted of manufacturing the same product in the same way for the same customer as the old corporation. In *Watson Meat Co., d/b/a Ideal Meat Co., Inc.*, 234 NLRB 1115 (1978), both corporations boned meat, although the old corporation owned the meat and also made sausage, whereas the new corporation boned meat owned by its customers.<sup>19</sup> In *Rushton & Mercier Woodworking Co., Inc., and Rand & Co., Inc.*, 203 NLRB 123 (1973), enf. 502 F.2d 1160 (1st Cir. 1974), cert. denied 419 U.S. 996 (1974), both corporations manufactured the same products, although the old corporation manufactured on a volume basis and the new corporation manufactured custom orders. The Board's and the court's opinions do not reveal the exact nature of the "changes, additions, expenditures, task-adaptations, etc. which came to exist in *N.L.R.B. v. Ozark Hardwood Co.*, 282 F.2d 1, 6 (8th Cir. 1960). However, I do not believe that the differences between Interior and the other corporations can be fairly described, in the court's words, as "essentially . . . evolutions, extensions and developments merely, such as could characteristically be expected to occur in the particular business field and in the economic era involved, without having so changed the nature of the enterprise and its job situations as to cause it to be outside the bounds of legitimate remedial area in respect to the discriminatees."<sup>20</sup>

If eventually affirmed, my conclusion that Interior is not the *alter ego* of the other three corporations means that the Union and the unlawfully discharged employees will as a practical matter be unable to collect anything from any of them.<sup>21</sup> At the outset of the hearing, I sug-

gested that the Board Orders and Court judgments previously issued in these cases might render the Florences personally liable for the required payments. Arly W. Eggersen, counsel for the General Counsel, replied negatively. While counsel is an able attorney, I am doubtful whether his assertions in this respect would preclude the Board and the court from otherwise interpreting their own Orders and judgments, respectively. For reasons which are unclear to me, Attorney Geslewitz has chosen in his brief to urge that the Florences are not personally liable.<sup>22</sup> It is true that corporate officers and agents are not ordinarily liable for backpay or other monetary remedies. However, under some circumstances they are so liable. See, e.g., *Wayne Electric, Inc.; and Electrical Installation and Service*, 241 NLRB 1056 (1979), and cases therein cited. Further, at least if the 1975-1979 Orders and judgments unambiguously impose monetary liability on the Florences personally, such a requirement could not be negated by any failure of the 1980 record to show such liability. The 1980 record fails to show that no monetary orders and judgments should have been entered against the Florences; and, in any event, at this point in the proceedings even such a showing might do the Florences no good. See *Wayne Electric, supra*. I express no views as to whether the prior orders and judgments do impose monetary liability on the Florences personally.<sup>23</sup> I have referred to the issue, and have set forth procedural facts which I regard as possibly relevant to its disposition, only because the Board's interpretation of its own Orders might speed up the final disposition of this 6-year-old proceeding.

#### CONCLUSIONS OF LAW

Interior Concepts, Inc., is not the *alter ego* of Custom Manufacturing Company (Successor to Zion Industries, Inc.—Curtain and Drapery Division); Bobbe Drapery Products Co., Inc.; or Concepts in Drapery Design, Inc. [Recommended Order for dismissal omitted from publication.]

<sup>19</sup> This change is remarkably similar to the change between Custom's operations and those of its admitted *alter egos* Bobbe and Concepts in Drapery. Custom manufactured draperies primarily from its own materials, whereas the other two corporations manufactured draperies from customers' materials.

<sup>20</sup> However, as previously noted, the backpay period terminated with the cessation (not claimed to be unlawful) of manufacturing operations and before Interior's incorporation. No contention is made that Interior should be required to offer reinstatement to the discriminatees or to bargain with the Union.

<sup>21</sup> In any event, a finding that Interior is an *alter ego* to Custom might render Interior liable for Custom's debt to Continental, a sum which likely exceeds the sums due under the Board's Order.

<sup>22</sup> Geslewitz appeared on behalf of Interior and Sterling and the Florences as Interior's agents. A determination that the Florences are personally liable could not be adverse to Interior's interests, and, indeed, might well benefit Interior if it were found liable for the amounts in question.

<sup>23</sup> As a practical matter, any such liability would probably have to be discharged by Roberta Florence. See fn. 7 and attached text *supra*.